

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of
VOICESTREAM WIRELESS CORPORATION
or OMNIPOINT CORPORATION,
Transferors,
and
VOICESTREAM WIRELESS HOLDING
COMPANY, COOK INLET/VIS GSM II PCS,
LLC, or COOK INLET/VIS GSM III PCS, LLC,
Transferees,
and
Various Subsidiaries and Affiliates of
OMNIPOINT CORPORATION,
Assignor,
and
COOK INLET/VIS GSM II PCS, LLC, or
COOK INLET/VIS GSM III PCS, LLC,
Assignees,
For Consent to Transfer of Control and
Assignment of Licenses and Authorizations

File Nos. 0000016354, et al.
DA 99-1634
File No. 0000054383
WTB Report No. 405
File No. 50001-CW-AL-00
DA 99-2737

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2000 Released: February 15, 2000

By the Commission: Commissioner Furchtgott-Roth issuing a statement.

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I. INTRODUCTION

1. On July 15 and 16, 1999, Omnipoint Corporation (“Omnipoint”) and VoiceStream Wireless Corporation (“VoiceStream”) (collectively, “Applicants”) filed applications pursuant to sections 214 and 310 of the Communications Act of 1934, as amended (“the Act”),¹ seeking Commission consent to: (1) transfer control of Omnipoint’s licenses and authorizations to VoiceStream Wireless Holding Company (“VWHC”); (2) transfer control of VoiceStream’s licenses and authorizations to VWHC; and (3) assign designated entity (“DE”) licenses held by Omnipoint to Cook Inlet/VS GSM II PCS, LLC (“CIVS II”) or Cook Inlet/VS GSM III PCS, LLC (“CIVS III”). These applications were filed in the context of the proposed merger of VoiceStream and Omnipoint (“the Merger”). On August 16, 1999, the Wireless Telecommunications Bureau (“Bureau”), on delegated authority,² issued a Public Notice to announce that the applications had been accepted for filing, and to establish a pleading cycle to permit interested parties an opportunity to comment on the proposed transaction.³

2. As discussed in more detail below, in this Order we grant the pending applications for transfer of control or assignment and the joint petition filed by the Federal Bureau of Investigation (“FBI”) and the U.S. Department of Justice (“DOJ”). We dismiss or deny the remaining petitions or comments.

¹ 47 U.S.C. §§ 214, 310(d), 310(b).

² 47 C.F.R. § 0.331.

³ See *VoiceStream Wireless Corporation, Omnipoint Corporation, Cook Inlet/VS GSMII PCS, LLC, and Cook Inlet/VS GSM III PCS, LLC Seek FCC Consent for Transfer of Control and Assignment of Licenses and Authorizations*, Public Notice, DA 99-1634 (rel. Aug. 16, 1999) (“Acceptance Notice”).

II. BACKGROUND

3. Omnipoint is a publicly traded corporation headquartered in Maryland. Through subsidiaries, Omnipoint constructs and operates PCS systems based on Global System for Mobile Communications (“GSM”) technology, predominantly throughout the Eastern and Central United States.⁴ Omnipoint previously has qualified as a DE under the Commission’s rules,⁵ and holds a number of PCS and WCS licenses in blocks reserved for DEs.

4. VoiceStream is a publicly traded corporation headquartered in the state of Washington. Through subsidiaries, VoiceStream constructs and operates PCS systems predominantly throughout the Western United States.⁶ Using GSM technology, VoiceStream offers traditional cellular-like telephony as well as a range of advanced mobile services, including paging, e-mail, facsimile, voicemail and Internet access.⁷ VWHC is a Delaware corporation organized to hold VoiceStream and Omnipoint after the merger.⁸ VoiceStream’s largest shareholder is Hutchison Telecommunications PCS (USA) Limited, a British Virgin Islands corporation, which is a subsidiary of Hutchison Wampoa Limited, a Hong Kong corporation.⁹

5. CIVS II and CIVS III are subsidiaries of Cook Inlet GSM, Inc. (“CIGSM”), a Delaware corporation, which holds a 50.1 percent in each entity and is the sole Manager of each entity.¹⁰ CIGSM is a wholly owned subsidiary of Cook Inlet Region, Inc., an Alaska corporation, organized pursuant to the Alaska Native Claims Settlement Act (“ANCSA”).¹¹ Pursuant to the Commission’s rules, entities owned or controlled by entities organized pursuant to the ANCSA may qualify as DEs.¹² All of the designated entity PCS and WCS licenses currently held by

⁴ Applications of VoiceStream Wireless Corporation, VoiceStream Wireless Holding Company, and Omnipoint Corporation for Transfer of Control, File No. 0000016501 (lead application), filed July 15, 1999, Attachment 1 (Description of the Transaction and Public Interest Considerations) to Form 603 at 1, 6 (“VoiceStream/Omnipoint Public Interest Statement”).

⁵ See 47 C.F.R. §§ 24.709, 27.209.

⁶ VoiceStream/Omnipoint Public Interest Statement at 1.

⁷ *Id.* at 6.

⁸ *Id.* at 1.

⁹ *Id.* at 4.

¹⁰ Applications of Omnipoint Corporation and Cook Inlet/VS GSM II PCS, LLC, File No. 0000016601 (lead application), filed July 15, 1999, Attachment 1 (Description of Transaction) to Form 603 at 1 (“Omnipoint/Cook Inlet Public Interest Statement”).

¹¹ *Id.* (citing 43 U.S.C. § 1601 *et seq.*).

¹² Applications of Omnipoint Corporation and Cook Inlet/VS GSM II PCS, LLC, File No. 0000016601 (lead application), filed July 15, 1999, Attachment 2 (Eligibility for Assignment as Entrepreneur) to Form 603 at 1 (citing 47 C.F.R. §§ 24.720(1)(11), 24.709(a)(2)) (“Omnipoint/Cook Inlet Eligibility Statement”).

Omnipoint subsidiaries will be assigned to one of these two Cook Inlet subsidiaries immediately prior to consummation of the merger.¹³ Omnipoint holds 49.9 percent of CIVS III and is the only non-managing member in both CIVS II and CIVS III.¹⁴

6. Pursuant to the proposed transaction, VoiceStream and Omnipoint will merge their businesses by each becoming a wholly owned subsidiary of VWHC. The combination of VoiceStream and Omnipoint will bring together two major providers of GSM in the United States, creating one of the largest wireless carriers in the country by population covered and one of the largest licensees in the world employing GSM technology. It will also allow for international roaming throughout the 133 countries that have also adopted the GSM standard.¹⁵ Together with the companies controlled by Cook Inlet GSM, Inc. subsidiaries, the combined company will provide service to more than one million customers, which the applicants state will create a seamless national network capable of competing with other established nationwide providers.¹⁶

7. In response to this Public Notice, four parties filed petitions or comments. QUALCOMM Incorporated (“QUALCOMM”) filed a petition to deny, arguing that Omnipoint has not met the conditions of its New York MTA A Block PCS license and that, therefore, Omnipoint’s New York license should be revoked and may not be transferred to VWHC.¹⁷ The arguments raised in QUALCOMM’s petition are addressed in Section IV.3 below. The FBI and DOJ filed a joint petition asking us to defer action on the applications pending the completion of an agreement between these agencies and the parties.¹⁸ The request of the agencies is addressed in Section IV.C below. Advanced Cordless Technologies (“ACT”) filed comments joining in QUALCOMM’s arguments.¹⁹ Though the deadline established in the *Acceptance Notice* for petitions and comments was September 16, 1999, ACT filed its comments on October 15, 1999. While we find there is a basis to dismiss ACT’s comments as late-filed, ACT’s pleading is, in effect, addressed below in our discussion of the arguments raised by QUALCOMM. Finally, a petition to deny filed by National Telecom PCS, Inc. was subsequently withdrawn.²⁰

¹³ *Id.* at 2. The DE licenses that Omnipoint acquired in Auction No. 22 will be held by CIVS III, and the rest of Omnipoint’s DE licenses will be held by CIVS II.

¹⁴ Omnipoint/Cook Inlet Public Interest Statement at 2.

¹⁵ VoiceStream/Omnipoint Public Interest Statement at 6, 11. The parties state that the combined company will hold licenses to provide service to over 175 million people. *Id.* at 6.

¹⁶ *Id.*

¹⁷ Petition to Deny, filed Sept. 16, 1999 by QUALCOMM Incorporated (“QUALCOMM Petition”).

¹⁸ *See* Petition to Defer, Pending an Agreement Resolving National Security and Law Enforcement Concerns, and the Imposition of Appropriate Conditions to the Licenses, filed October 5, 1999, by the United States Department of Justice and the Federal Bureau of Investigation (“DOJ/FBI Petition”). Though late-filed, we address the request of the agencies.

¹⁹ Comments and Intervention Motion by Advanced Cordless Technologies, filed October 15, 1999.

²⁰ *See Wireless Telecommunications Bureau Approves Withdrawal of Three Petitions to Deny and Two Applications for Review*, Public Notice, DA 99-2877 (rel. Dec. 17, 1999) (approving the withdrawal of three petitions to deny and two applications for review filed by National Telecom PCS, Inc. in various proceedings).

8. After the applications of VoiceStream and Omnipoint were filed, Omnipoint agreed to acquire five F Block PCS licenses from East/West Communications, Inc.²¹ No comments or petitions were received in response to the public notice announcing this proposed acquisition, and consent to assign the licenses to Omnipoint was granted by public notice on February 11, 2000.²² Because the East/West licenses must be held by a qualified DE, on November 23, 1999, the parties filed an application for consent to assign these five licenses to CIVS II before consummation of the larger VoiceStream – Omnipoint transaction.²³ This application was placed on public notice on December 6, 1999.²⁴ This Order includes action on these five applications along with the other applications for consent to assign licenses and authorizations to CIVS II or CIVS III. In addition to the East/West licenses, Omnipoint and VoiceStream filed an additional application on December 8, 1999, to transfer control to VWHC of certain Omnipoint licenses that had inadvertently been left out of the original filing.²⁵ This application was accepted for filing on December 15, 1999.²⁶ No petitions or comments were received. As indicated in the caption above, these additional licenses are also addressed by this action.

III. DISCUSSION

9. As explained below, we find that the proposed merger between Omnipoint and VoiceStream poses no risk of harm to U.S. telecommunications markets and would permit the merged companies to form a near-nationwide GSM network capable of competing better with other nationwide service offerings. Accordingly, we find that pursuant to sections 214(a), 310(b) and 310(d) of the Communications Act, as amended (“the Act”), grant of the pending requests for transfer of control would serve the public interest. Therefore, we deny the petitions and grant the applications, as discussed in more detail below.

A. Statutory Authority

10. Pursuant to section 214(a) of the Act, the Commission must determine whether the Applicants seeking transfer or assignment of the Title II authorizations at issue have demonstrated that their proposed transaction will serve the public interest, convenience and necessity.²⁷ A similar standard applies with respect to the Title III licenses at issue. Section 310(d) of the Communications

²¹ The application for these assignments was filed on November 1, 1999, *see* File No. 0000041919, and was accepted for filing on November 10, 1999, *see* WTB Report No. 365, rel. Nov. 10, 1999.

²² *See Wireless Telecommunications Bureau Grants Consent to Assign F Block Broadband PCS Licenses*, Public Notice DA 00-261 (rel. Feb. 11, 2000).

²³ *See* File No. 50001-CW-AL-00.

²⁴ *See Omnipoint Corporation and Cook Inlet/Vs GSM II PCS, LLC Seek FCC Consent to Assign Broadband PCS Designated Entity Licenses*, Public Notice, DA 99-2737, rel. Dec. 6, 1999.

²⁵ *See* File No. 0000054383.

²⁶ *See* WTB Report No. 405 (rel. Dec. 15, 1999).

²⁷ 47 U.S.C. § 214(a). *See Applications of WorldCom and MCI Communications Corporation*, CC Dkt. No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18,025, 18,030, at ¶ 8 (1998) (“*WorldCom/MCI Order*”). As delineated in the *Acceptance Notice*, Omnipoint affiliates have requested Commission consent to transfer control of eight international 214 authorizations. *See Acceptance Notice* at 4.

Act provides, in pertinent part, that “[n]o construction permit, or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”²⁸ Section 310(d) also requires the Commission to consider the license transfer or assignment application as if it were filed pursuant to section 308 of the Communications Act, which governs applications for new facilities and for renewal of existing licenses.²⁹

11. In addition to ensuring that assignor and assignee are duly qualified and comply with the Commission’s rules, we also consider, as part of our examination under the “public interest, convenience, and necessity” standard of sections 310(d) and 214(a) of the Communications Act, the effect on competition of a proposed assignment.³⁰ Under Commission precedent, our public interest analysis is informed by, rather than limited to, traditional antitrust principles³¹ and also encompasses the broad aims of the Communications Act,³² including evaluating whether any

²⁸ 47 U.S.C. § 310(d). With the exception of the international 214 authorizations discussed above, the remaining licenses for which the Applicants seek consent to transfer control or assign are for wireless services and subject to the requirements of Section 310(d).

²⁹ Section 310(d) provides that the Commission shall consider any such applications “as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question.” Furthermore, the Commission is expressly barred from considering “whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.” *Id.*

³⁰ *Applications of Ameritech Corp. and SBC Communications Inc. for Transfer of Control*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279, at ¶¶ 46-49 (rel. Oct. 8, 1999) (“*SBC/Ameritech Order*”); *WorldCom/MCI Order*, 13 FCC Rcd at 18,030-33, ¶¶ 9-12. The Commission also has independent authority under Sections 7 and 11 of the Clayton Act to disapprove the acquisition of common carriers engaged in wire or radio communications or radio transmissions of energy in any line of commerce in any section of the country where the effects of such an acquisition may substantially lessen competition, or tend to create a monopoly. 15 U.S.C. §§ 18, 21(a). The Bureau, acting pursuant to delegated authority, 47 C.F.R. § 0.331, chooses not to exercise its statutory authority under the Clayton Act in this case because the Commission’s jurisdiction under the Communications Act is sufficient to address all questions regarding the competitive effects of the proposed assignments, including the issue of whether the assignment may substantially lessen competition or tend to create a monopoly. *See, e.g., Craig O. McCaw and American Telephone and Telegraph Company*, Memorandum Opinion and Order, 9 FCC Rcd 5836 (1994), *recon. denied on other grounds*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11,786 (1995), *aff’d sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

³¹ *Satellite Business Systems*, 62 F.C.C.2d 997, 1069, 1088 (1977), *aff’d sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *SBC/Ameritech Order* FCC 99-279 at ¶ 49.

³² *WorldCom/MCI Order*, 13 FCC Rcd at 18,030 ¶ 9 (citing Applications of NYNEX Corporation and Bell Atlantic Corporation, 12 FCC Rcd 19,985, 19,987 ¶ 2 & n.2 (1997) (“*Bell Atlantic/NYNEX Order*”)).

public interest benefits may result from the proposed transaction.³³ Applicants bear the burden of proving that the proposed transaction serves the public interest,³⁴ and we must determine whether they have met this burden.³⁵

12. The public interest standard of Sections 310(d) and 214(a) requires a balancing of the potential public interest harms of the proposed transaction against its potential public interest benefits.³⁶ In summary, the Applicants must demonstrate that the transaction will not violate or interfere with the objectives of the Act or Commission rules, and that the overall effect of the assignment will be to advance the public interest.³⁷

B. Qualifications of VWHC

13. As a regular part of our public interest analysis under section 310(d), we determine whether the proposed licensees are qualified to hold Commission licenses and whether grant of the application would result in the violation of any Commission rules.³⁸ In this case, no party has challenged the qualifications of VWHC or the Cook Inlet entities. Based on our independent review of the qualifications of the transferee and the assignees, we conclude that we need examine further only the legal qualifications of proposed transferee VWHC with respect to its foreign ownership.

14. Section 310(b)(4) of the Act allows the Commission to deny or revoke a common carrier radio license if: (1) more than 25 percent of any entity that controls the applicant or licensee is owned of record or voted by aliens, foreign governments or their representatives, or foreign corporations, and (2) the Commission finds that denial or revocation would serve the public interest.³⁹ The Commission most recently refined this public interest inquiry in its *Foreign Participation Order*.⁴⁰ As a result of the merger, Hutchison Whampoa Limited (Hutchison), a limited liability holding company based in the Hong Kong Special Administrative Region of the

³³ *SBC/Ameritech Order*, FCC 99-279 at ¶ 49; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063 158; *Applications of MCI Communications Corporation and British Telecommunications P.L.C.*, Memorandum Opinion and Order, 12 FCC Rcd 15,351, 15,367 ¶ (1997) (“*BT/MCI Order*”).

³⁴ *WorldCom/MCI Order*, 13 FCC Rcd at 18,031 ¶ 10n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant) and *Le Flore Broadcasting Co.*, 66 F.C.C.2d 734, 736-37 ¶¶ 2-3 (1975) (Initial Decision) (burden of proof is on licensee on issue of whether applicants have the requisite qualifications to be or to remain Commission licensees and whether grant of applications would serve public interest, convenience and necessity)).

³⁵ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,001, 20,007, ¶¶ 29, 36; *BT/MCI Order*, 12 FCC Rcd at 15,367, ¶ 33.

³⁶ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063, ¶ 157.

³⁷ *SBC/Ameritech Order*, FCC 99-279, ¶ 48.

³⁸ We do not re-evaluate the qualifications of the assignor or transferor unless issues related to their basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing. See *Mobilemedia Corporation et al.*, 14 FCC Rcd 8017, 8018, ¶ 4 (citing *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964)); see also Stephen F. Sewell, “Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934,” 43 Fed. Comm. L.J. 277, 339-40 (1991). No such issues have been raised in this matter.

³⁹ 47 U.S.C. §310 (b)(4); see also *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order, 12 FCC Rcd 23,890, 23,935 ¶ 97, recon. pending (“*Foreign Participation Order*”).

⁴⁰ *Id.*

People's Republic of China, will increase its indirect ownership from 23.97 percent in VoiceStream to 30.6 percent in VWHC.⁴¹ Therefore, a public interest analysis under Section 310(b)(4) is required.⁴²

15. In a prior proceeding, the Telecommunications Division of the International Bureau ("Division") concluded that indirect foreign ownership of up to 39.9 percent in VoiceStream (including the 19.9 percent interest then held by Hutchison) was in the public interest.⁴³ In that decision, the Division found that Hutchison's alien investment satisfied the Commission's "effective competitive opportunities" ("ECO") analysis under section 310(b)(4) and would enable VoiceStream to "develop services, build network infrastructure more quickly, and introduce new international capabilities."⁴⁴ The Commission's ECO analysis under section 310(b)(4) considers whether effective competitive opportunities exist for U.S. investment in the foreign investor's "home market" for the analogous radio-based service. This analysis begins with a determination of the appropriate national market of the foreign investor. The Commission has stated that the foreign investor's home market should reflect its principal place of business.⁴⁵ In Hutchison's case, the Division found that Hong Kong was the appropriate home market for comparison and that Hong Kong's wireless telecommunications market satisfies the ECO test.⁴⁶ The Division also found that the other public interest factors support approval of Hutchison's investment.

16. Since adoption of the Division's order, the Commission has implemented new rules on foreign participation in the U.S. market. These rules cover, among other things, requests to exceed the 25 percent indirect foreign ownership benchmark contained in section 310(b)(4) of the Act. In the *Foreign Participation Order*, the Commission stated that, because additional foreign investment can promote competition in the U.S. market, the public interest would be served by permitting more open investment by foreign entities whose home market is a member of the World Trade Organization ("WTO").⁴⁷ In such a case, the Commission does not apply an ECO analysis, and there is a strong presumption that no competitive concerns are raised by the indirect foreign investment.⁴⁸ The Commission also stated in the *Foreign Participation Order* that parties who have already received approval to exceed the 25 percent benchmark up to a certain level of indirect foreign ownership must continue to seek further Commission approval in order to increase that level of ownership.⁴⁹ In the present transaction, therefore, we evaluate the merits of Hutchison's

⁴¹ See VoiceStream/Omnipoint Public Interest Statement at 4.

⁴² *Foreign Participation Order*, 12 FCC Rcd at 23,935 ¶ 97.

⁴³ See *Western Wireless Corporation and Western PCS Corporation*, Order, 13 FCC Rcd 64 ¶ 1 (IB, Telecom. Div. 1997) ("*Western Wireless Order*").

⁴⁴ See *id.* at 71 ¶ 21.

⁴⁵ See *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873 (1995) ("*Foreign Carrier Entry Order*").

⁴⁶ See *Western Wireless Order*, 13 FCC Rcd at 68 ¶ 8.

⁴⁷ See *Foreign Participation Order*, 12 FCC Rcd at 23,940 ¶ 111.

⁴⁸ *Id.* at 23,913, 23,941-42 ¶¶ 50, 113, 116.

⁴⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23,941 ¶ 114 (accepting the FBI's assertion that increases in foreign ownership or influence may present concerns that Executive Branch agencies may need an opportunity to evaluate before the Commission allows an increased level of foreign ownership).

proposed increased ownership to 30.6 percent of VWHC based on the record now before us.

17. Here, balancing the five factors of the Commission's "principal place of business" test,⁵⁰ we find that Hutchison principally conducts its business in Hong Kong:

- (1) *Place of incorporation:* Hong Kong.⁵¹
- (2) *Nationality of investment principals, officers, and directors:* VoiceStream states that Hutchison, a publicly traded company, is 49.9 percent owned by Cheung Kong (holdings) Limited ("CKHL"), a Hong Kong Corporation, and 7.6 percent owned by the Hong Kong government.⁵² Li Ka-shing, a resident of Hong Kong, serves as Chairman of both Hutchison and CKHL and controls 34.9 percent of CKHL's shares.⁵³ The majority of the directors of Hutchison work in Hong Kong and are residents of Hong Kong.⁵⁴
- (3) *Country in which its world headquarters is located:* Hong Kong.
- (4) *Country in which the majority of its tangible property is located:* VoiceStream states that 78.5 percent of Hutchison's investment and other properties is located in Hong Kong.⁵⁵
- (5) *Country from which it derives the greatest sales and revenues from its operations:* VoiceStream states that 58 percent of Hutchison's profits is derived from its operations in Hong Kong.

18. Based on the factors cited above, we find that Hong Kong, a WTO member, continues to be Hutchison's principal place of business. Therefore, we will not apply an ECO analysis but will, instead, apply the Section 310(b)(4) analysis delineated in our *Foreign Participation Order*.

19. Under the *Foreign Participation Order*, VWHC is entitled to a strong presumption that no competitive concerns are raised by Hutchison's increased investment to 30.6 percent of VWHC's stock. We see no reason to rebut that presumption. Accordingly, considering Executive

⁵⁰ See *Foreign Carrier Entry Order*, Report and Order, 11 FCC Rcd at 3951 ¶ 207 (listing five factors). See also, e.g., *AT&T Corp. and Loral Spacecom Corporation*, Order and Authorization, 12 FCC Rcd 925 (1997) (applying the principal place of business test); *Melbourne International Communications Ltd.*, 12 FCC Rcd 898 (1997)(same); *In the Matter of Global Crossing Ltd. and Frontier Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 15,911, 15,918-19 ¶¶ 16-17 (rel. Sept. 21, 1999) ("*Global Crossing/Frontier Order*").

⁵¹ See Letter from Louis Gurman, Counsel for Applicants, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed Jan. 24, 2000 ("*VoiceStream January 24 Ex Parte Letter*").

⁵² *Id.* at 2.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 3.

Branch concerns with respect to the proposed transaction, we conclude, pursuant to section 310(b)(4) and the Commission's *Foreign Participation Order*, that the public interest would be served by allowing the proposed indirect foreign ownership subject to certain Executive Branch concerns that we address below in Section C. In effect, this ruling allows the common carrier licensees of the merged company to be indirectly owned by Hutchison in an amount up to 30.6 percent. The company would need additional Commission authority under section 310(b)(4) before Hutchison could increase its investment above authorized levels. The merged company would also need additional authority before any other foreign entity or entities acquire, in the aggregate, a greater-than-25 percent indirect interest in its licensee subsidiaries. For this purpose, non-U.S. or non-Hong Kong ownership of Hutchison would be included in the total indirect foreign ownership of the licensee subsidiaries.

20. We note that, in a Public Notice issued June 4, 1999, the Division allowed VoiceStream to increase its level of indirect foreign ownership in its subsidiary licensees to 49.9 percent.⁵⁶ In the current proceeding, VoiceStream requests that the level of permissible foreign ownership in VoiceStream and its operating subsidiaries set forth in the *June 4th Public Notice* be applied to VWHC and the additional operating subsidiaries that it will acquire in connection with the Merger.⁵⁷ We consider the June 4 action to be applicable only to the specific foreign investment identified in VoiceStream's earlier petition for declaratory ruling that was addressed by the *June 4th Public Notice*.⁵⁸ We note, however, that under our *Foreign Participation Order*, the merged company may acquire up to and including 25 percent indirect foreign ownership in addition to Hutchison's foreign ownership of 30.6 percent in VWHC.⁵⁹ This affords the merged company the ability to acquire up to 55.6 percent total indirect foreign ownership under our decision today. If the merged company intends to permit a greater-than-25-percent indirect foreign ownership by entities other than Hutchison, or to increase Hutchison's 30.6 percent indirect foreign interest, it must obtain additional Commission approval to do so.

C. Public Interest Analysis

1. Competitive Framework

21. Where the transfer or assignment of licenses involves telecommunications service

⁵⁶ See *International Authorizations Granted*, Public Notice, DA 99-1059 (IB, Telecom. Div. rel. June 4, 1999) ("*June 4th Public Notice*"). By this Public Notice, the Division also approved a 15-percent investment in VoiceStream by Northern Telecom, a Delaware corporation owned and controlled by Canadians. It is our understanding, however, that this investment did not occur.

⁵⁷ See VoiceStream/Omnipoint Public Interest Statement at 4-5.

⁵⁸ The *June 4th Public Notice* states that the Commission indicated that the increase in the level of permissible alien ownership in VoiceStream is in the public interest only in the manner described in the party's petition. See *June 4th Public Notice*. We read the *June 4th Public Notice* to approve Northern Telecom's investment in the amount stated in the petition (15 percent) and to approve an increase in the overall level of permissible foreign ownership in VoiceStream to 49.9 percent to allow for additional unnamed foreign investors acquiring publicly traded shares (provided that not more than 25 percent of VoiceStream's shares would be held by non-WTO investors). We note that Hutchison's then alien ownership of 19.9 percent was approved previously by the Commission. See, generally, *Western Wireless Order*, 13 FCC Rcd 64.

⁵⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23,941 ¶ 114.

providers, the Commission's public interest determination must be guided primarily by the Communications Act, as amended.⁶⁰ In cases such as this that involve an international carrier, we are guided also by the U.S. Government's commitment under the WTO Basic Telecommunications Agreement, which seeks to promote global markets for telecommunications so that consumers may enjoy the benefits of competition.⁶¹ Our analysis of competitive effects under the Commission's public interest standard consists of four steps. First, we define the relevant product and geographic markets.⁶² Second, we identify current and potential participants in each relevant market, especially those that are likely to have a significant competitive effect. Third, we evaluate the effects that the merger may have on competition in the relevant markets.⁶³ Fourth, we consider whether the proposed transaction will result in merger-specific efficiencies, such as cost reductions, productivity enhancements, or improved incentives for innovation.⁶⁴ Ultimately, we must weigh any harmful and beneficial effects to determine whether, on balance, the merger is likely to enhance competition in the relevant markets.

2. Analysis of Potential Adverse Effects

22. To determine the relevant product and geographic markets, we identify the services offered by VoiceStream and Omnipoint and evaluate the extent to which services offered by other communications companies compete for the business conducted by the merging parties. According to Applicants, both companies provide mobile communications services to U.S. consumers. VoiceStream and Omnipoint are both licensed to provide PCS services. With respect to the provision of commercial communications services, VoiceStream also holds specialized mobile radio (SMR) and local multipoint distribution service (LMDS) licenses.⁶⁵

23. In addition, for purposes of conducting our public interest analysis, we also consider the offerings of other entities whose interests are attributable to either VoiceStream or Omnipoint under our CMRS cross-ownership rules.⁶⁶ For present purposes, we attribute the licenses of both (a)

⁶⁰ We note that the 1996 amendments to the Communications Act were specifically intended to produce competitive telecommunications markets. *AT&T Corporation, et al., v. Iowa Utils. Bd.*, 119 S. Ct. 721, 724 (1999).

⁶¹ The commitments undertaken as a result of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS. *Fourth Protocol to the General Agreement on Trade in Services (WTO 1997)*, 36 I.L.M. 354, 366 (1997). These commitments are colloquially referred to as the WTO Basic Telecom Agreement, though they are not technically contained in a stand-alone agreement.

⁶² See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,014, ¶ 49; *BT/MCI Order*, 12 FCC Rcd at 15,368, ¶ 35.

⁶³ Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. at 41,558 §§ 2.1, 2.2.

⁶⁴ See Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission (Revised, April 8, 1997).

⁶⁵ VoiceStream/Omnipoint Public Interest Statement at 1. We do not further discuss competitive issues regarding these LMDS licenses because Omnipoint is neither a local exchange carrier nor a multi-channel video programming distributor (cable operator).

⁶⁶ See generally §§ 20.6(d) and 22.942(d).

Western Wireless and its subsidiaries and (b) Cook Inlet Region, Inc. and its subsidiaries⁶⁷ to VoiceStream.⁶⁸

a. Mobile Voice Services

i. Overlapping Interests

24. In this section, we examine the competitive impact of overlapping interests attributable to the Applicants and determine that the proposed merger will not reduce actual competition in any relevant market for mobile voice or data services. Both VoiceStream and Omnipoint provide mobile voice and messaging services to U.S. consumers using broadband PCS licenses. VoiceStream is directly licensed to provide PCS services throughout much of the western United States, and selected eastern cities.⁶⁹ VoiceStream also holds SMR licenses in portions of the Wichita, Kansas BTA.⁷⁰ Omnipoint is licensed to provide PCS services throughout the eastern United States. The PCS licenses held by VoiceStream and Omnipoint overlap geographically in numerous markets.⁷¹ However, in none of these markets do VoiceStream and Omnipoint presently compete against each other for business.⁷² VoiceStream currently offers PCS services to consumers

⁶⁷ Except as noted, *infra*, notes 76 and 88.

⁶⁸ VWHC holds a 49.9 percent equity interest in Cook Inlet Region, Inc. VoiceStream/Omnipoint Public Interest Statement at 6. VoiceStream and Western Wireless also have at least one common officer or director as a consequence of the May 1999 spin off of VoiceStream by Western Wireless. *Id.* at 14 n.17.

⁶⁹ VoiceStream's licenses in the eastern United States include major metropolitan markets in Ohio and Virginia. Donaldson, Lufkin & Jenrette, *The Global Communications Industry* (Summer 1999) at 167-68.

⁷⁰ VoiceStream/Omnipoint Public Interest Statement at 17.

⁷¹ Attributable overlaps include markets in Colorado, Illinois, Kansas, Missouri, Ohio, Oregon, Pennsylvania, Texas and Virginia. VoiceStream/Omnipoint Public Interest Statement at 14-17 and Applications of VoiceStream Wireless Corporation, VoiceStream Wireless Holding Company, and Omnipoint Corporation for Transfer of Control, File No. 0000016501 (lead application), filed July 15, 1999, Attachment 3 (Licenses and Applications Being Assigned or Transferred from VoiceStream Wireless Corporation and Omnipoint Corporation to VoiceStream Wireless Holding Corporation and to the Cook Inlet Entities), pp. 27-29 ("VoiceStream/Omnipoint/ Cook Inlet License Holdings").

A spectrum cap analysis is also warranted with respect to possible overlaps involving St. Louis, MO BTA (#5); Rolla, MO BTA (#6); Poplar Bluff, MO BTA (#7); Cape Girardeau-Sikeston, MO BTA (#11); Salina, KS BTA (#8); Wichita, KS BTA (#12); and Mt. Vernon, IL BTA (#10). VoiceStream/Omnipoint Public Interest Statement at 15-17. Of these, VoiceStream provides service only in Wichita. *Id.* at 6.

⁷² Amendment to File No. 0000016518, submitted January 21, 2000, at Attachment 1, p. 1 ("*VoiceStream January 21st Amendment*").

in 11 western cities and four cities in the central United States.⁷³ Omnipoint currently provides broadband PCS services in the eastern and central United States, including New York, Philadelphia, Boston, Miami and Detroit.⁷⁴

25. Similarly, the attributable interests that VoiceStream holds in PCS licenses held by Cook Inlet Region, Inc. and its subsidiaries overlap with licenses held by Omnipoint in Missouri,⁷⁵ Arkansas, and Texas.⁷⁶ However, neither Omnipoint nor Cook Inlet currently provides service in any of these markets. Finally, the attributable interests that VoiceStream holds in the cellular licenses held by Western Wireless overlap the PCS license holdings of Omnipoint in rural portions of Kansas.⁷⁷ In these cases, however, Omnipoint does not yet provide service to these areas. Consequently, the proposed merger will not reduce actual competition in any relevant market for mobile voice or data services.

26. We recognize the possibility that Omnipoint and VoiceStream might have become competitors at some future date, and that the Merger eliminates any such prospects. Our general policy, however, has been to permit the aggregation of CMRS spectrum and interests therein up to the limits permitted under the spectrum cap rule, provided that such aggregation neither reduces actual competition nor stymies the development of competition in any market.⁷⁸ We find no special circumstances present here that warrant adopting a different view.

27. The Merger will also result in the aggregation of spectrum in certain markets in a manner that would have violated the spectrum aggregation limits in force at the time the Applications were filed.⁷⁹ However, the rules adopted in the *Spectrum Cap Order* relaxed these limits, and eliminated the need for divestiture that otherwise would have been required.⁸⁰ We turn next to the remaining cases identified by the Applicants in which the aggregation of spectrum would violate our current rules. As discussed below, we will permit the parties to aggregate spectrum under the circumstances presented in this case, provided that they come promptly into compliance with our spectrum aggregation rules.

⁷³ VoiceStream/Omnipoint Public Interest Statement at 6.

⁷⁴ *Id.*

⁷⁵ *Id.* at 15-16; VoiceStream/Omnipoint/Cook Inlet License Holdings at 27.

⁷⁶ *Id.* at 27-28. We exclude here a potential overlap involving the Aberdeen, SD C-block PCS license that was assigned on September 27, 1999 to Cook Inlet Region, Inc. of Georgia, a subsidiary in which VoiceStream holds no ownership interest. See *VoiceStream January 21st Amendment*.

⁷⁷ Specifically, these cellular-PCS overlaps involve Kansas RSA Nos. 3, 8, 9, 10, and 14. VoiceStream/Omnipoint Public Interest Statement at 16-17; VoiceStream/Omnipoint/Cook Inlet License Holdings at 27.

⁷⁸ See *In the Matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, etc.*, WT Dkt. Nos. 98-205 and 96-59, GN Dkt. No. 93-252, Report and Order, FCC 99-244, rel. Sept. 22, 1999, a (“*Spectrum Cap Order*”).

⁷⁹ VoiceStream/Omnipoint/Cook Inlet License Holdings at 27-29. Cases in which aggregation occurs are denoted by “No” designation in column with header “Competitor Substituted By Merger Rather Than Eliminated By Merger.”

⁸⁰ See *In the Matter of Western PCS II License Corporation Request for Waiver of Section 20.6 of the Commission’s Rules in the Denver MTA*, Order, DA 99-2533 (CWD, rel. Nov. 16, 1999).

ii. Spectrum Cap Issues

28. Applicants identify numerous instances in which the surviving entity currently holds, or would hold in the event the proposed merger is consummated, spectrum in excess of the limits imposed by the Commission's spectrum cap rule applicable at the time the application was filed.⁸¹ Recently, however, in the *Spectrum Cap Order*, the Commission reexamined its rules regarding the permissible aggregation of CMRS spectrum, carefully weighing the associated benefits and costs. As a result, the Commission relaxed its CMRS spectrum aggregation limits in certain respects. These new rules went into effect on November 8, 1999.⁸²

29. As a consequence of its successful participation in Auction 22, Omnipoint came to hold the C, E, and F Block broadband PCS licenses, totaling 50 MHz of spectrum, in both Detroit and Flint, Michigan. In these applications, the applicants seek to assign the C and F Block authorizations to CIVS II to comply with our DE rules. However, these licenses would continue to be attributed to Omnipoint, and ultimately, to VoiceStream, because of Omnipoint's 49.9 percent interest in CIVS II.

30. In its May 5, 1999 long form application in Auction 22, Omnipoint requested a temporary waiver of the spectrum cap rule pending the outcome of the rulemaking. The Bureau granted this request on September 8, 1999.⁸³ With the release of the spectrum cap order on September 22, 1999, Applicants were required to come into compliance with these rules by December 21, 1999. On December 7, 1999, Omnipoint requested an extension of this temporary waiver until 90 days following the closing of the Merger.⁸⁴ Omnipoint makes this request to effect an orderly disposition of the various licenses that it will need to divest to comply with the spectrum cap rule, and specifically, to enable these licenses to be sold through a single, unified transaction.⁸⁵ On December 9, 1999, the Bureau placed this request on public notice;⁸⁶ no comments were received. The Bureau subsequently granted a temporary extension of the deadline, pending the outcome of this proceeding, for Omnipoint to come into compliance with Section 20.6.⁸⁷

31. In 16 other markets, Applicants would also exceed the Commission's spectrum aggregation limits upon consummation of the proposed Merger. Applicants request interim waivers of the spectrum cap rule with respect to each of these markets.⁸⁸ As in the Detroit and Flint markets,

⁸¹ VoiceStream/Omnipoint Public Interest Statement at 14-17.

⁸² See 47 C.F.R. §20.6(c).

⁸³ See *In the Matter of Pioneer Telephone Association, Inc., et al.*, Order, DA 99-1823 (WTB, rel. Sept. 8, 1999); see also File No. 0000012978.

⁸⁴ See Request for Extension of Rule Waiver, filed December 7, 1999 by OPCS Three, LLC (File No. 0000012978).

⁸⁵ *Id.* at 4-5.

⁸⁶ See *Wireless Telecommunications Bureau Seeks Comment on OPCS Three, LLC Request for Extension of Waiver of Section 20.6 of the Commission's Rules*, Public Notice, DA 99-2767 (CWD, rel. Dec. 9, 1999).

⁸⁷ See Letter from William W. Kunze, Deputy Chief, Commercial Wireless Division, to E. Ashton Johnston, Piper Marbury Rudnick & Wolfe, LLP, Counsel for OPCS Three, LLC, dated December 21, 1999.

⁸⁸ VoiceStream/Omnipoint Public Interest Statement at 15-17. Applicants have recently modified this request by (1) deleting the request for an interim waiver in the Aberdeen, SD BTA and (2) adding a request for an interim waiver in

the relief that they request would provide them with 90 days following the closing of the merger to comply, unless a longer period is permitted under any amendments to section 20.6 that may have taken force subsequent to the date of filing.⁸⁹ We note that our current rules require consummation of the Merger within 180 days after release of this Order,⁹⁰ and divestitures sufficient to come into compliance with our spectrum aggregation limits prior to consummation of the Merger.⁹¹ Thus, without a waiver the Applicants would have up to 180 days following release of this Order to come into compliance, depending on when they consummate the Merger.

32. As we discuss in Section III.4. below, we believe that the Merger will promote competition by furthering the development of an additional nationwide PCS system. Because of the extent of divestitures required here, and the consequent need for an orderly divestiture process, we find that the public interest in promoting this development will be served by providing limited additional time to effect these divestitures. We also note that this request involves a waiver of our spectrum cap rule, rather than our cellular cross-ownership restriction,⁹² and that none of the petitioners raised concerns regarding this request. Therefore, we grant the Applicants a waiver of section 20.6(e)(1) such that they will have 90 days after consummation of the Merger, or 180 days following release of this Order, whichever is earlier, to come into compliance with respect to these 18 markets.

b. International Services

33. Omnipoint and VoiceStream, through their wholly owned subsidiaries, are both currently authorized to resell international switched telecommunications services. As part of the proposed merger, Omnipoint and VoiceStream request authority to transfer control of several international 214 authorizations held by certain subsidiaries of Omnipoint and VoiceStream to VWHC. There is no allegation or evidence in this record to demonstrate that the proposed merger would have anti-competitive effects in any U.S. international service market, including any input

the El Dorado-Magnolia, AR BTA. See *VoiceStream January 21st Amendment*. With respect to the Ed Dorado-Magnolia, AR BTA, on November 24, 1999, the Commission recorded the consummation of the assignment of the A-block cellular license for Hempstead, Arkansas 11 RSA to GCC License L.L.C. ("GCC"). GCC is a wholly-owned subsidiary of General Cellular L.L.C., which in turn is a wholly-owned subsidiary of Western Wireless and, therefore, is attributed to VoiceStream. When this newly acquired cellular license is combined with Omnipoint's El Dorado E-block BTA license and CIVS' El Dorado C-block license, the total amount of CMRS spectrum attributable to VWHC in the AR-11 rural service area would be 65 MHz.

In addition, on September 27, 1999, CIVS notified the Commission of a *pro forma* assignment of PCS station WPOJ731 for Aberdeen, SD from CIVS to Cook Inlet Region, Inc. of Georgia, a company in which VoiceStream holds no ownership interest. See File No. 0000028693.

⁸⁹ VoiceStream/Omnipoint Public Interest Statement at 17.

⁹⁰ 47 C.F.R. § 1.948(d).

⁹¹ 47 C.F.R. § 20.6(e)(1).

⁹² 47 C.F.R. § 22.942.

market that is essential for the provision of international service.⁹³ Our conclusion is supported by the fact that the applicants have no U.S. international transport facilities,⁹⁴ and their merger will not eliminate any significant potential participant in the provision of international services.⁹⁵

34. Our conclusion that the Merger would not have anti-competitive effects in any U.S. international service market takes into account whether, as a result of VoiceStream's acquisition of Omnipoint (and its operating subsidiaries), Omnipoint would become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that Omnipoint is authorized to serve. As the Commission has observed in the *Foreign Participation Order*, the exercise of foreign market power in the U.S. market could harm U.S. consumers through increases in prices, decreases in quality, or a reduction in alternatives in end user markets.⁹⁶ Generally, this risk occurs when a U.S. carrier is affiliated with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market.⁹⁷ In circumstances in which an authorized U.S. carrier acquires an affiliation with a foreign carrier that has market power on the foreign end of an authorized route, the Commission may classify the U.S. carrier as "dominant" in its provision of international service on the newly affiliated route altogether.⁹⁸ In certain circumstances, it may also impose other safeguards on the U.S. carrier's provision of service on the route, or prohibit the carrier from operating on that route, if the affiliation raises a concern contrary to the public interest or Commission policies.⁹⁹

35. VoiceStream certifies, pursuant to section 63.18 of the Commission's rules,¹⁰⁰ that it

⁹³ *WorldCom/MCI Order*, 13 FCC Rcd at 18,071 ¶ 81.

⁹⁴ See International Bureau Report: 1998 Section 43.82 Circuit Status Data, Report No. IN 99-36 (rel. Dec. 17, 1999).

⁹⁵ There is no evidence in the record that either company intends to, or is particularly likely to, enter the international services market separate and apart from the provision of international services as part of the mobile offering. There is also no evidence in the record that the companies are among a limited number of significant potential competitors in the international services market. In addition, as compared to other actual or potential competitors, there is no evidence that either company has any special capabilities or incentives to enter the international services market, whether by virtue of significant financial resources or expertise, telecommunications assets or brand name reputation. See generally *WorldCom/MCI Order*, 13 FCC Rcd at 18,025; *Global Crossing/Frontier Order*, 14 FCC Rcd 15,911.

⁹⁶ *Id.* at 23,951-54 ¶¶ 144-46.

⁹⁷ *Id.* at 23,954 ¶ 147. As recently amended, Section 63.09(e) of the rules, 47 C.F.R. § 63.09(e) provides that "[t]wo entities are affiliated with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one."

⁹⁸ See 47 C.F.R. § 63.18(e)(3) & (m) (stating that any transferee that is affiliated with a foreign carrier and that desires to be regulated as non-dominant for the provision of particular international services to that country should provide information in its transfer of control application to demonstrate that it qualifies for non-dominant classification pursuant to section 63.10). See also 47 C.F.R. § 63.11(e)(1) (stating that the Commission may, in the case of a notification of foreign carrier affiliation filed under this section, impose dominant carrier regulation on the authorized carrier for the affiliated route).

⁹⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23,913-15, 23,945 ¶¶ 50-53, 128. The Commission may take such action in the context of a section 214 application, including an application to transfer control of a section 214 authorization, or in the context of those notifications of foreign carrier affiliations filed pursuant to Section 63.11(a). See 47 C.F.R. § 63.11(a) & (e)(2); see also *Foreign Participation Order*, 12 FCC Rcd at 24,036 ¶ 333.

¹⁰⁰ 47 C.F.R. § 63.18(h)(1).

is not a foreign carrier and is not affiliated with a foreign carrier.¹⁰¹ VoiceStream requests that, after the merger, Omnipoint's subsidiaries continue to be regulated as non-dominant for the provision of international communications services to all permissible international points.

36. There is no evidence in the record, and we are unaware of any information, that contradicts the certifications and statements made by VoiceStream with respect to its foreign affiliations. We therefore find that the proposed merger would not result in Omnipoint or its operating subsidiaries acquiring an affiliation with a foreign carrier with market power. This finding supports our conclusion that the merger would not have anti-competitive effects in any U.S. international market and would serve the public interest, convenience, and necessity. We also grant, on the basis of this finding, VoiceStream's request to maintain Omnipoint's classification as a non-dominant carrier on all U.S. international routes.¹⁰²

3. Pioneer's Preference

37. QUALCOMM argues that we should deny the application to transfer control of Omnipoint's New York MTA A Block PCS license, and should instead revoke Omnipoint's license, because Omnipoint has not met the terms of the pioneer's preference that was awarded with the license.¹⁰³ QUALCOMM does not, however, challenge either Omnipoint's or VoiceStream's overall qualifications as a licensee, nor does it challenge the transfer of control and assignment applications relating to Omnipoint's other license holdings.¹⁰⁴ Specifically, QUALCOMM argues that Omnipoint has not complied with the condition in its New York MTA license that requires it to make "substantial use" of the proprietary IS-661 technology that was the basis for the Commission's award of the pioneer's preference. QUALCOMM further argues that Omnipoint is not using the IS-661 technology to provide commercial service to customers in New York, and that the predominant technology being used by Omnipoint in the New York MTA is GSM.¹⁰⁵ In support, QUALCOMM cites a statement in a trade publication that Omnipoint has not deployed the

¹⁰¹ VoiceStream/Omnipoint Public Interest Statement at 4.

¹⁰² 47 C.F.R. § 63.10(a)(1), (3) (providing that a U.S. carrier that is not affiliated with a foreign carrier in a particular country shall presumptively be classified as non-dominant).

¹⁰³ QUALCOMM Petition at 7. QUALCOMM's petition, therefore, objects to the transfer of control of only those licenses in File No. 0000016538.

¹⁰⁴ Because the issue raised by QUALCOMM does not bear on the qualifications of the parties or the Merger as a whole, we question whether it is appropriate for QUALCOMM to raise these concerns in the context of the Merger. However, while we have discretion to consider this issue separately, we have chosen to address QUALCOMM's argument in this proceeding to minimize the uncertainty for the parties that could have resulted from proceeding otherwise.

¹⁰⁵ *Id.* at 4.

IS-661 technology commercially,¹⁰⁶ statements in an Omnipoint SEC filing that IS-661 covers only one-third of the New York MTA,¹⁰⁷ and statements by Omnipoint that describe its system as a GSM system.¹⁰⁸

38. Omnipoint responds that it has fulfilled the condition on its license that it make “substantial use” of the IS-661 technology.¹⁰⁹ Omnipoint states that between 1992 and 1998, it built, deployed, and used three generations of IS-661 technology in the New York MTA;¹¹⁰ that it spent over \$130 million to develop and deploy IS-661 technology;¹¹¹ that it operates an IS-661/GSM integrated network there;¹¹² that it has the capability of providing service with IS-661 to 36.94% of the MTA (9,756,074 persons);¹¹³ and that IS-661 has been accepted by the technical community.¹¹⁴ Omnipoint also argues that it has engaged in substantial efforts to market the IS-661 technology for use in other markets. Omnipoint states that it entered into a commercial relationship with Nortel to integrate Omnipoint’s equipment into Nortel’s GSM architecture, which meant that IS-661 could be implemented as a commercial product for sale to any PCS license holder.¹¹⁵ This effort did not succeed, Omnipoint contends, because once other PCS systems chose other technologies, they had no interest in a technology that was being used in only one MTA.¹¹⁶ Omnipoint acknowledges that its deployment of IS-661 technology has not been commercially successful, but maintains that the appropriate interpretation of “substantial use” involves assessing what Omnipoint has done to deploy the technology, and not whether customers have accepted the technology. QUALCOMM does not dispute Omnipoint’s factual assertions with respect to its use of the IS-661 technology, but contends that they are insufficient to support a finding of “substantial use.”

39. The issue presented by QUALCOMM’s petition is whether Omnipoint’s use of the

¹⁰⁶ *Id.* at 4 (citing Lynnette Luna, “Pondering the Fate of Pioneer’s Program,” *RCR*, July 23, 1999, at 1, 41).

¹⁰⁷ QUALCOMM Petition at 5 (citing Omnipoint Corporation 1998 SEC Form 10-K, April 6, 1999, p. 7).

¹⁰⁸ QUALCOMM Petition at 5.

¹⁰⁹ Opposition to Petition to Deny, filed September 27, 1999, by Omnipoint Corporation, at 6 (“Omnipoint Opposition”). Omnipoint also argues that QUALCOMM does not have standing to challenge transfer of Omnipoint’s New York license. *Id.* at 22, 29-30. We need not reach the question of whether QUALCOMM has standing in this case because we address QUALCOMM’s substantive arguments below.

¹¹⁰ *Id.* at 7; *Ex Parte* Filing from E. Ashton Johnston, Esq., Piper & Marbury, LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed November 5, 1999, Presentation to the FCC at 8, 20, 23, 27 (“*November 5th Ex Parte Filing*”).

¹¹¹ Omnipoint Opposition at 10; *November 5th Ex Parte Filing*, Presentation to the FCC at 9.

¹¹² Omnipoint Opposition at 8.

¹¹³ *Id.* at 9; *November 5th Ex Parte Filing*, Presentation to the FCC at 8, 27.

¹¹⁴ Omnipoint Opposition at 10; *November 5th Ex Parte Filing*, Presentation to the FCC at 16. Omnipoint sought and obtained recognition for IS-661 within the technical community. Omnipoint first submitted the technology to the Joint Technical Committee of the TIA and Committee T1 in November 1993. *Id.* at 35. A year later, the technology was approved as IS-661 with the nomenclature “Composite CDMA/TDMA.” *Id.* The standard was updated in open forums continuously throughout 1998 to reflect continued development, and a final standard based on IS-661 was adopted as ANSI Standard T1 LB 779 in October, 1999. *Id.*

¹¹⁵ Omnipoint Opposition at 10.

¹¹⁶ *Id.* at 21.

IS-661 technology as described above constitutes “substantial use” within the meaning of our pioneer’s preference rules. For the reasons stated below, we conclude that it does. Alternatively, as discussed below, we conclude that the record before us also justifies a waiver of the “substantial use” condition if we had determined that it had not been met in this case. In either case, we conclude that QUALCOMM has failed to demonstrate that Omnipoint’s New York license should be revoked or that there is any other obstacle to approving the transfer of control of the New York license to VWHC.

40. In the *Third Report and Order*, we granted pioneer’s preferences to three companies, including Omnipoint.¹¹⁷ In that Order, we stated that pioneer’s preferences were intended to foster development of new services and improve existing services by reducing the delays and risks that innovators would otherwise face in the licensing process.¹¹⁸ Applicants for a pioneer’s preference were required to demonstrate the technical feasibility of the new service or technology.¹¹⁹ We conditioned each award of a license pursuant to a pioneer’s preference on the licensee “building a system that substantially uses the design and technologies upon which its preference award is based”¹²⁰ and stated that “the risk an innovator takes is that it may not be able to translate its developmental work into full business operation.”¹²¹ We also stated that there were circumstances under which we would consider a waiver of the substantial use condition. Specifically, we stated that we would consider a waiver “in a case in which there is an overriding national objective that may be thwarted, such as if nationwide PCS interoperability were to be thwarted.”¹²²

41. QUALCOMM’s argues that the “substantial use” test is not met in this case because Omnipoint has not put the IS-661 technology into commercial use in the New York market, and has in fact used a different technology, GSM, as the basis for its commercial system. We reject the argument that commercial acceptance is a necessary element of “substantial use.”¹²³ We did not condition the award of pioneer’s preference licenses on achieving a certain level of commercial acceptance for the technology. Nor did we intend that failure of the technology to be commercially viable would result in the loss of the pioneer’s preference license. Instead, we have stated that the substantial use test requires careful assessment of a variety of factors:

A finding of ‘substantial use’ entails a judgment of the degree and/or nature of deployment and use, which can be affected by the nature

¹¹⁷ *In the Matter of Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Third Report and Order, 9 FCC Rcd 1337 (1994) (“*Third Report and Order*”).

¹¹⁸ *Id.* at 1338, ¶ 3.

¹¹⁹ *Id.* at 1338, ¶ 4.

¹²⁰ *Id.* at 1338, ¶ 8. Omnipoint’s pioneer’s preference license grant requires that it “construct a 30 MHz broadband Personal Communications Services system on Frequency Block A (1850-1865 MHz/1930-1945 MHz) in the New York MTA that substantially uses the design and technology upon which the pioneer’s preference award to Omnipoint Communications, Inc. was based.”

¹²¹ *Id.* (citing *In the Matter of Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, Report and Order, 6 FCC Rcd 3488, 3492 ¶ 32 (1991)).

¹²² *Third Report and Order*, 9 FCC Rcd at 1339 n.11.

¹²³ QUALCOMM Reply at 4.

and extent of other technologies with which the pioneer's preference technology is entwined, the effect of market forces, the effect of ensuing technological advancements, and other factors.¹²⁴

42. In this case, our assessment of these factors leads us to conclude that Omnipoint has met the substantial use condition. First, Omnipoint has invested significant capital to develop and deploy IS-661 technology in the New York market.¹²⁵ Moreover, while IS-661 currently is used only for internal Omnipoint communications,¹²⁶ the IS-661 system is deployed throughout at least one-third of Omnipoint's New York MTA license area. We conclude that this level of deployment is sufficient to meet the requirement that Omnipoint "build a system" that substantially uses the pioneer technology. In addition, we find that Omnipoint has made a *bona fide* effort to market the IS-661 technology for commercial use.¹²⁷ The record indicates that this effort did not succeed due to both technological and market factors. We agree with Omnipoint, however, that the substantial use determination should be based on whether the licensee made an earnest effort to commercialize the technology, not on a *post hoc* determination of whether the attempt has been a commercial success.¹²⁸ The fact that Omnipoint has ultimately provided commercial service in New York via its GSM network does not undercut this conclusion. Therefore, we find that Omnipoint has met the requirements of the substantial use condition.

43. Assuming, *arguendo*, that we could reasonably find that the substantial use condition has not been met, we conclude that the circumstances that exist here justify a waiver of the condition. As noted above, we stated in the *Third Report & Order* that we would consider a waiver of the substantial use condition "in a case in which there is an overriding national objective that may be thwarted, such as if nationwide PCS interoperability were to be thwarted."¹²⁹ We believe that the circumstances anticipated in the *Third Report and Order* are present here. Omnipoint is the only GSM carrier in the New York MTA, and Omnipoint's New York GSM system is an essential building block of any effort to create a nationwide GSM network. If we were to require Omnipoint to use IS-661 on a commercial basis in the New York MTA as a condition of its license, we would be mandating the use of a technology that is not interoperable with any other PCS system in any other market. At the same time, the practical effect today would be to thwart the potential for the nation's largest market to be part of any GSM network.

¹²⁴ *In the Matter of Omnipoint Communications, Inc. New York MTA Frequency Block A*, Memorandum Opinion and Order, 11 FCC Rcd 10,785, 10,789 (1996).

¹²⁵ Omnipoint Opposition at 10.

¹²⁶ *November 5th Ex Parte Filing*, Presentation to the FCC at 33.

¹²⁷ Omnipoint has marketed its IS-661 models at tradeshows, in brochures, by direct sales to prospective PCS operators and direct sales to major manufacturers, such as Nortel, which paid several million dollars for IS-661 licensing rights and, in 1995, began marketing IS-661. *Id.* at 36, 41.

¹²⁸ Omnipoint Opposition at 15-17, 20, 26-28.

¹²⁹ *Third Report and Order*, 9 FCC Rcd at 1339 n.11.

44. The case for a waiver is made even more compelling because the prospect of a nationwide GSM network is concrete and immediate, not merely theoretical. One of the principal goals and public interest benefits of the proposed Merger is that it will facilitate the development of a nationwide GSM network in the near term. Under these circumstances, enabling Omnipoint to include its New York system in the Merger clearly and directly furthers the objective of achieving nationwide interoperability. Therefore, in addition to finding that Omnipoint has met the substantial use condition, we conclude that waiver of the condition on our own motion is appropriate as an alternative basis for our denial of QUALCOMM's petition.¹³⁰

4. Public Interest Benefits

45. Applicants contend that the proposed merger will generate significant benefits and efficiencies. Applicants argue that consumers will benefit from the creation of a nationwide footprint for GSM subscribers, which will result in additional competition in this market currently served by AT&T Wireless, Sprint PCS and Nextel Communications.¹³¹ In addition, Applicants claim that the Merger will produce benefits through economies of scale and scope, improved spectrum efficiency, and wider availability of advanced services.¹³²

46. We agree with Applicants that GSM subscribers will benefit from the expanded footprint to be offered by VoiceStream, and that all mobile phone users needing access throughout the nation will benefit significantly from the creation of another competitor with a near-nationwide footprint. Moreover, the Merger may also provide more U.S. consumers with the opportunity to subscribe to a carrier that enables both local and international access, where GSM technology often prevails. While Applicants' remaining claims are certainly plausible, we are unable to gauge the likelihood or significance of these benefits based on the information in this record.¹³³

5. Executive Branch Concerns

47. The Executive Branch has raised concerns regarding national security and law enforcement in this proceeding, which, pursuant to the public interest analysis articulated in the Commission's *Foreign Participation Order*,¹³⁴ we must consider. In their petition, DOJ and FBI state that there are national security, law enforcement, and public safety issues raised by the proposed merger because the newly-created and larger telecommunications service offering of the merged company (specifically, PCS) would be subject to foreign control.¹³⁵

¹³⁰ Section 1.3 of our rules, 47 C.F.R. § 1.3, provides that, for good cause shown, we may grant waivers of our rules either pursuant to a request or on our own motion. As discussed above, we believe that Omnipoint has shown that good cause exists for a waiver of the substantial use condition.

¹³¹ VoiceStream/Omnipoint Public Interest Statement at 6, 11.

¹³² *Id.* at 6, 12.

¹³³ See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063 ¶157.

¹³⁴ *Foreign Participation Order*, 12 FCC Rcd at 23,891 ¶ 59.

¹³⁵ DOJ/FBI Petition at 4.

48. On January 28, 2000, DOJ and FBI requested that the Commission adopt an agreement between DOJ, FBI, and VoiceStream (“DOJ/FBI Agreement”) that resolves the national security, law enforcement, and public safety issues raised in the DOJ/FBI Petition.¹³⁶ The DOJ/FBI Agreement provides, *inter alia*, that VoiceStream shall (1) ensure that its network is configured so as to be capable of complying with lawful U.S. process; (2) make available in the United States certain call and subscriber data, if VoiceStream stores such data;¹³⁷ and (3) take reasonable measures regarding use of facilities used in domestic telecommunications (specifically, with respect to personnel holding sensitive positions),¹³⁸ information storage,¹³⁹ and access to foreign entities.¹⁴⁰ The parties also have agreed to adopt and maintain policies with regard to confidentiality and security of electronic surveillance orders and authorizations, legal process, and statutory authorizations and certifications related to subscriber records and information.

49. In fulfilling our public interest mandate, we take into account the record and afford the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.¹⁴¹ We recognize that, separate from our licensing process, the applicants have entered into a voluntary agreement with the DOJ and FBI and that this Agreement expressly states that the DOJ and FBI will not object to grant of the pending applications provided that the Commission approves the agreement and conditions grant of the Applications on compliance with it.¹⁴²

50. We note that the DOJ/FBI Agreement, the negotiation of which delayed resolution of this proceeding, reflects a unique situation and contains certain provisions that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part, and we will consider any subsequent agreement on a case-by-case basis. However, notwithstanding these concerns about the broader implications of the DOJ/FBI Agreement, we see no reason to modify or disturb the agreement of the parties on this matter. Therefore, in accordance with the request of the DOJ and FBI and the discussion above, we condition our grant of the Applications to transfer or assign certain licenses and authorizations in connection with the proposed merger on compliance with the DOJ/FBI Agreement.

¹³⁶ See Petition to Adopt Condition to Authorizations and Licenses, filed by the Department of Justice and the Federal Bureau of Investigation, January 28, 2000 (“DOJ/FBI Petition to Adopt”), attached hereto as Appendix A.

¹³⁷ See DOJ/FBI Petition to Adopt at Appendix A (DOJ/FBI Agreement), Art. 1.

¹³⁸ *Id.* at Art. 2.

¹³⁹ *Id.* at Art. 1.

¹⁴⁰ *Id.* at Art. 2.

¹⁴¹ See *Foreign Participation Order*, 12 FCC Rcd at 23,919-21 ¶¶ 61-66.

¹⁴² DOJ/FBI Agreement at Art. 4.7.

IV. CONCLUSION

51. Based upon our reviews under sections 214(a) and 310(d) of the Act, we determine that this merger will not likely result in harm to competition in any relevant market. We also determine that the proposed merger will likely result in several public interest benefits. We therefore conclude that, on balance, Applicants have demonstrated that these transfers serve the public interest, convenience, and necessity. Accordingly, we grant the Applications, subject to the conditions set forth herein.

V. ORDERING CLAUSES

52. IT IS ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), that the Petition to Deny filed by QUALCOMM Incorporated IS DENIED.

53. IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the Comments and Intervention Motion of Advanced Cordless Technologies IS DISMISSED.

54. IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214(a) and (c), 309, 310(b) and (d), that the Petition to Defer, Pending an Agreement Resolving National Security and Law Enforcement Concerns, and the Imposition of Appropriate Conditions to The Licenses filed by the Federal Bureau of Investigation and the U.S. Department of Justice IS GRANTED.

55. IT IS ORDERED that, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214(a) and (c), 309, 310(b) and (d), the authorizations and licenses related thereto are subject to compliance with provisions of the Agreement between VoiceStream, the United States Department of Justice, and the United States Federal Bureau of Investigation, dated January 26, 2000, filed with the Commission on January 28, 2000 and attached hereto as Appendix A, which Agreement is fully binding upon VoiceStream and its subsidiaries, successors, and assigns that provide telecommunications services within the United States. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. §§ 222(a) and (c)(1) and the Commission's implementing regulations.

56. IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the authorizations and licenses related thereto are subject to the condition that the parties come into compliance with 47 C.F.R. § 20.6 within 90 days of the date that the transaction is consummated, or within 180 days of the release of this Order, whichever is earlier.

57. IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the condition attached to Omnipoint's New York MTA A Block PCS license that requires Omnipoint to build a PCS system in the New York MTA that substantially uses the design and technology upon which its pioneer's preference award is based IS WAIVED.

58. IT IS ORDERED that, pursuant to Section 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), 154(j), 309, 310(d), the approval of the assignment of C Block and F Block PCS licenses controlled by Omnipoint to CIVS II or CIVS III is conditioned upon the execution by the assignees, assignor and the Commission of all Commission loan documents, unless the licenses being assigned have been paid in full. Unless the licenses that will be assigned to CIVS II or CIVS III have been paid in full, this approval is conditioned upon CIVS II's and CIVS III's execution of the applicable financing statements (i.e., the UCC-1 Forms) and payment, on or before the consummation date, of all costs associated with the preparation and recordation of the financing statements. In addition, all installment payments must be current on the consummation date. To be current, the installment payment may not be in the non-delinquency period or grace period. In addition, there must be no outstanding fees, including late fees, due to the Commission. No licenses will be issued to the assignees until the Commission receives notification pursuant to section 1.948(d) of the Commission's rules, 47 C.F.R. § 1.948(d), that all conditions that must be met at or before consummation have been satisfied, including execution of the appropriate financing documents. Failure of the parties to comply with any of the financial obligations described above will result in automatic cancellation of the Commission's approval hereunder and in dismissal of the relevant assignment applications.

59. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(b), 310(d), that the above-referenced applications filed by Omnipoint Corporation, VoiceStream Wireless Corporation, VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, and Cook Inlet/VS GSM III PCS, LLC in the above-captioned proceedings ARE GRANTED subject to the above conditions.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

DOJ/FBI Agreement

APPENDIX B

Parties Filing Petitions or Comments

Parties Filing Petitions or Comments

QUALCOMM Incorporated

U.S. Department of Justice and Federal Bureau of Investigation

Advanced Cordless Technologies

National Telecom PCS, Inc. (withdrawn)

Parties Filing Oppositions

VoiceStream Wireless Corporation

Omnipoint Corporation

Parties Filing Replies

QUALCOMM Incorporated

National Telecom PCS, Inc. (withdrawn)